No. 4859.

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United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Graver Corporation, a corporation,
Plaintiff in Error,
vs.
Hercules Gasoline Company, a corporation,
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

The evidence shows the material facts in this case to be as follows: Defendant on or about July 27, 1923, sold to Geo. F. Getty of Los Angeles, two 80,000-barrel all steel tanks. [Tr. pp. 43, 45, 49.]

In February, 1924, one of the tanks had been erected and fully paid for. The other tank known as "Graver Tank No. 2" had not been erected, and Geo. F. Getty found that he did not have need for this second tank. He owed the defendant a balance of $9,000.00 on account of the purchase price of "Graver Tank No. 2" and was anxious to dispose of it. [Tr. pp. 48, 55, 64, 75.]

On or about February 7, 1924, S. Reid Holland, representing the Graver Corporation, C. R. Bird, representing the plaintiff, and H. P. Grimm, representing Geo. F. Getty, met in the office of Geo. F. Getty and two contracts submitted by S. Reid Holland, were executed. [Tr. pp. 60, 69, 70, 74.] One was a contract between defendant and Geo. F. Getty whereby Geo. F. Getty agreed to pay the balance of $9,000.00 due on "Graver Tank No. 2" to defendant and defendant released Geo. F. Getty from further liability on account of the purchase price of "Graver Tank No. 2", and agreed to enter into a contract with plaintiff, Hercules Gasoline Company, which was to provide for the sale of certain fabricated steel to plaintiff to be shipped on or before August 1, 1924. [Tr. pp. 63, 64.] Geo. F. Getty paid the $9,000.00 to defendant at the time the contract was executed. [Tr. pp. 45, 49, 70, 74.]

The other contract executed at the same time was between defendant and plaintiff. By its terms defendant agreed to ship to plaintiff not later than August 1, 1924, the equivalent in tonnage at prevailing prices of $36,000.00 of fabricated steel upon plaintiff's obtaining due evidence of having acquired title to "Graver Tank No. 2". Defendant also agreed to accept "Graver Tank No. 2" and to give plaintiff a credit therefor in the amount of $27,000.00, on account of the fabricated steel purchased by plaintiff from defendant. [Tr. pp. 62, 63.]

Plaintiff obtained title to "Graver Tank No. 2" and so advised defendant. [Tr. pp. 46, 56, 67, 68.] On or about April 4, 1924, defendant notified plaintiff that it would not be bound by its contract and repudiated the

same. [Paragraph 3 of Answer. Tr. pp. 14, 37.] Thereafter plaintiff sold "Graver Tank No. 2" to the Western Pipe and Steel Company for $12,000.00, which was the best price obtainable. [Tr. pp. 66, 72.]

A general and special demurrer was filed to the complaint and overruled by consent of counsel for the respective parties. [Tr. p. 12.]

At the close of plaintiff's case, defendant moved for a nonsuit and to strike out the exhibits offered in evidence by plaintiff, which motion was denied. [Tr. p. 73.] Thereafter, defendant introduced evidence on its own behalf. [Tr. p. 73, *et seq*:]

The District Court gave judgment in favor of plaintiff for $15,000.00, and costs. [Tr. p. 27.] It is from this judgment that defendant appeals predicating error on the District Court's rulings on, First: Defendant's demurrer (Opening Brief p. 4), Second: Defendant's motion for a nonsuit and motion to strike out evidence made at the close of plaintiff's case (Opening Brief p. 8), Third: Defendant's objections to the admission of evidence (Opening Brief pp. 13, 16, 18, 19, 20, 23, 24, 27, 28), and Fourth: The court's Findings of Fact II, III and IV (Opening Brief pp. 35, 36, 37).

Under the First heading defendant contends:

1.

That the District Court erred in overruling the general demurrer to the complaint in that:

A. There is not an allegation in the complaint of an obligation upon the part of the plaintiff. (Opening Brief p. 4.)

B. There is not an allegation in the complaint that plaintiff produced due evidence of having acquired title to "Graver Tank No. 2".

2.

That the District Court erred in overruling the special demurrer to the complaint in that the complaint did not contain an allegation of facts showing substantial damage to plaintiff. (Opening Brief p. 6.)

Under the Second heading defendant contends:

1.

That the District Court erred in overruling defendant's motion for a nonsuit made at the close of plaintiff's case in that:

There was no proof offered that S. Reid Holland was the agent of defendant (Opening Brief p. 9), and

There was no evidence that S. Reid Holland was authorized in writing to execute the contract between plaintiff and defendant. (Opening Brief p. 11.)

2.

That the District Court erred in not granting defendant's motion made at the close of plaintiff's case to strike out certain exhibits and other evidence introduced by plaintiff. (Opening Brief p. 8.)

Under the Third heading defendant contends:

1.

That the District Court erred in admitting in evidence the following exhibits: 6, 102, 103, 79, "A", 10, 11, 38, 16, 37, 39, 138, 139, 142, and 144. (Opening Brief pp. 13, 16, 18, 19, 20, 23, 24, 27.)

2.

That the District Court erred in admitting in evidence statements of S. Reid Holland regarding his authority to represent the defendant. (Opening Brief pp. 28, 32.)

3.

That the District Court erred in refusing to strike out evidence regarding the contents of a lost letter written by defendant to S. Reid Holland in that:

A. There was no proof of the loss of the letter.

B. There was no proof of the due execution of the letter.

C. There was no recital of the contents of the letter by a witness who recollected it. (Opening Brief p. 29.)

4.

That the District Court erred in permitting H. P. Grimm to testify regarding statements of S. Reid Holland about his authority to represent defendant. (Opening Brief p. 32.)

5.

That the District Court erred in refusing to grant defendant's motion made at the close of plaintiff's case to strike out testimony received conditionally subject to being connected, in that no testimony was ever offered establishing a connection or laying a proper foundation for its admission. (Opening Brief p. 34.)

Under the Fourth heading defendant contends that there is no evidence to support the finding of the District Court that:

A. Plaintiff and defendant entered into an agreement in writing. (Opening Brief p. 35.)

B. S. Reid Holland was authorized to sign the agreement on behalf of defendant. (Opening Brief p. 36.)

C. It is not true that S. Reid Holland was not authorized by defendant to execute the agreement sued upon. (Opening Brief p. 37.)

D. Plaintiff produced due evidence of having acquired title to "Graver Tank No. 2" in that the only testimony on the subject is the conclusions of C. R. Bird and S. Reid Holland. (Opening Brief p. 36.)

ARGUMENT AND AUTHORITIES.

FIRST.

1.

The Court Did Not Err in Overruling the General Demurrer to the Complaint.

A. The Complaint Contained an Allegation of an Obligation to Be Performed by the Plaintiff and Therefore Was Not Void for Lack of Mutuality.

(1) In the Complaint There Is an Express Allegation of Plaintiff's Obligation.

The complaint expressly alleges that plaintiff agreed to accept and pay for steel products of the value of $36,000.00. Paragraph II of the complaint reads in part as follows:

"That on or about February 7, 1924, plaintiff and defendant entered into a certain agreement in writing wherein and whereby *defendant agreed* by and with plaintiff that upon plaintiff producing due evidence of its having acquired title to a certain steel tank, described as Graver Tank No. 2, defendant would ship promptly

as directed and not later than August 1, 1924, steel products to be ordered by plaintiff of the aggregate price of $36,000.00 at prices prevailing at the date of shipment *which plaintiff agreed to accept and pay for at said price.*" (Italics ours.) [Tr. p. 6.]

(2) The Acceptance of an Offer to Sell Merchandise Implies an Agreement Upon the Part of the Purchaser to Pay for the Commodity.

T. W. Jenkins & Co. v. Anaheim Sugar Co., 247 Fed. 958;

Sterling Coal Co. v. Silver Spring Bleaching & D. Co., 162 Fed. 848;

1 Williston on Sales, 2nd Ed. p. 7, Sec. 5a;

1 Williston on Contracts, p. 154;

3 Williston on Contracts, p. 2341.

In the case of *Sterling Coal Co. v. Silver Spring Bleaching & D. Co.*, 162 Fed. 848, it was contended that the agreement was unilateral in that the defendant did not undertake to buy its consumption of coal from the plaintiff, but that the plaintiff simply promised to sell at specified rates if required. In denying the correctness of this position the court says in the course of the opinion at page 850:

> "We do not so construe the paper. It purports to embody an 'agreement' that the *plaintiff is to 'furnish'* the defendant with its entire consumption of coal. *This fairly imports that the defendant agrees to accept*, as well as the plaintiff to deliver, and that meaning is confirmed by the absolute requirement that the plaintiff should have 1000 tons constantly in the defendant's yard, and the further provision as to the 3000 tons." (Italics ours.)

In the case of *Lima Locomotive & M. Co. v. National Steel C. Co.,* 155 Fed. 77, at page 79, the court says:

> *"By the acceptance of the plaintiff's proposal, the defendant was obligated to take from the plaintiff all castings which their business should require.* The contract, if capable of two equally reasonable interpretations, should be given that interpretation which will tend to support it and thus carry out the presumed intent of both parties." (Italics ours.)

In the case of *T. W. Jenkins & Co. v. Anaheim Sugar Co.,* 247 Fed. 958, the Circuit Court of Appeals reversed the judgment of the District Court in sustaining a demurrer to the complaint on the ground of lack of mutuality. At page 961 this court quotes with approval from the opinion in the case of *Cold Blast Trans. Co. v. Kansas City, etc., Co.,* 114 Fed. 77, saying:

> "Indeed, the court said: '*An accepted offer* to furnish or deliver such articles of personal property as shall be needed, required or consumed by the established business of the acceptor during a limited time is binding and may be enforced, because *it contains the implied agreement of the acceptor to purchase* all the articles that shall be required in conducting his business during this time from the party who makes the offer.' Golden Cycle Manufacturing Co. v. Rapson, etc., Co., 188 Fed. 179, 112 C. C. A. 95; Sterling Coal Co. v. Silver Springs, 162 Fed. 848, 89 C C. A. 520." (Italics ours.)

B. There Is an Allegation in the Complaint That Plaintiff Produced Due Evidence of Having Acquired Title to Graver Tank No. 2.

(1) The Complaint Expressly Alleges That Plaintiff Had Produced Due Evidence of Its Having Acquired Title to Graver Tank No. 2.

In paragraph III of the complaint it is alleged:

"And despite the fact that *plaintiff had* theretofore *produced due evidence of its having acquired title to said Graver Tank No. 2,* and was ready and willing to perform each of the terms and conditions of said agreement upon its part to be performed * * *." (Italics ours.) [Tr. p. 6.]

(2) A Complaint Is Sufficient as Against a General Demurrer If the Essential Facts Appear Only Inferentially, by Way of Conclusions of Law or by Way of Recital.

Haskins v. Jordan, 123 Cal. 157;
Fuller Desk Co. v. McDade, 113 Cal. 360;
City of Santa Barbara v. Eldred, 108 Cal. 294;
Amestoy v. Electric R. T. Co., 95 Cal. 311 & 314;
Winter v. Winter, 8 Nevada 129;
1 Bancrofts Code Pleading, 369.

In *1 Bancrofts Code Pleading,* page 369, it is said:

> "A complaint is sufficient as against a general demurrer if the essential facts appear only inferentially, or by way of conclusions of law, *or by way of recital.*" (Italics ours.)

In the case of *Fuller Desk Co. v. McDade,* 113 Cal. 360 (45 Pac. 694), in ruling upon a general demurrer to

the complaint, the court says in the course of its opinion at page 363:

> "We think it must be held that such facts appear in the complaint here (Arzaga v. Villalba, 85 Cal. 191, 196, and cases cited); true, *rather by way of recital,* when they should have been alleged directly; *but the demurrers interposed by defendants do not include this fault among the grounds they specify,* and under the rule requiring objections based on such defects to be taken by special demurrer, we are not at liberty to treat the complaint as bad on that account. (San Francisco v. Pennie, 93 Cal. 465; Santa Barbara v. Eldred, 108 Cal. 294.)" (Italics ours.)

In the case of *City of Santa Barbara v. Eldred,* 108 Cal. 294 (41 Pac. 410), the appellate court in passing upon the sufficiency of the complaint as against a general demurrer says at page 297:

> "Nor can the other objections, which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law, *or by way of recitals, prevail on such demurrer."* (Italics ours.)

In the case of *Winter v. Winter,* 8 Nevada, 129, the court says at page 135:

> "The demurrer was therefore properly overruled. The complaint does state that the plaintiff was entitled to the water. It is true this allegation is *by way of recital,* but no such objection was specified in the demurrer, and *it is well settled that it can not be insisted upon under a general demurrer."* (Italics ours.)

Therefore, even though we concede for the purpose of argument, defendant's criticism that the allegations objected to in the complaint are *mere recitals* still they cannot be attacked by defendant's general demurrer.

2.

The Court Did Not Err in Overruling the Special Demurrer to the Complaint.

(1) In an Action for Breach of Contract an Allegation That Plaintiff Has Been Damaged in a Named Sum Is a Sufficient Allegation of General Damages.

Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553;
Long Beach City School District v. Dodge, 135 Cal. 401; 67 Pac. 499;
Summers v. L. F. S. Syndicate, 46 Cal. App. 250; 189 Pac. 286;
8 Cal. Jur., 888;
1 Bancrofts Pleading, 283.

In the case of *Summers v. L. F. S. Syndicate*, 46 Cal. App. 250 (189 Pac. 286), at page 253, the court says:

> "(2) Respondents claim that the complaint is uncertain in that it does not attempt to segregate the various items of damage according to the amounts of damage severally caused by the items stated constituting the various alleged imperfections in the buildings; that it merely fixes the total amount of damages without indicating the process by which the plaintiff arrives at that amount of damages. We think that the damages are alleged with sufficient particularity. In *Long Beach etc. District v. Dodge*, 135 Cal. 401 (67 Pac. 499), the action was to re-

cover on a bond given by the contractor for the construction of a high school building. The court held that it was not necessary to state in the complaint a cause of action as to each of the defects in the building on account of which the plaintiff sought to recover; that the Code of Civil Procedure, in section 454, has provided against surprise by requiring the plaintiff to furnish, when demanded in writing, a copy of the account; that the words 'the account' in that section include such damages as those stated in the case. (See, also, Jensen v. Dorr, 159 Cal. 742, 746 (116 Pac. 553).)"

In the case of *Long Beach, etc. District v. Dodge,* 135 Cal. 401 (67 Pac. 499), at page 407 the court says:

"It is contended that defendants had no means of determining from these allegations in what respect Lutge's work would be attacked or what evidence would be required on the part of defendants.

We think the demurrer was properly overruled. It certainly could not be necessary to state in the complaint a cause of action as to each of the defects in Lutge's work for correcting which the plaintiff sought to recover; but while permitting pleadings to be condensed and simplified in respect to such matters, the code has provided against surprise, by requiring the plaintiff to furnish, when demanded, in writing, a copy of the account, under the penalty of being precluded from giving evidence thereof. (Code Civ. Proc., Sec. 454.) This section uses the words, 'the account', but we think it includes such demands as are stated in this case. In *Barkley v. Rensselaer etc. R. R. Co.,* 27 Hun. 515, in speaking of section 531 of the Code of Civil Procedure of the state of New York, it is said: 'In ordinary language, the

word *account* is applied to almost every claim on contract which consists of several items.' We think it is so used under our code; and it is there expressly said: 'It is not necessary for a party to set forth in a pleading the items of an account therein alleged.' Appellants' contention is not that a cause of action for these items is not stated, but that they were entitled to an allegation 'which would have given them an opportunity in advance of the trial to ascertain the points upon which they would be called upon to make a defense.' This would lead to an unnecessary prolixity in pleading, which it was intended to avoid by giving a remedy under section 454 of the Code of Civil Procedure. That the demurrer was properly overruled, see *Wise v. Hogan,* 77 Cal. 184; *Pleasant v. Samuels,* 114 Cal. 34; *McFarland v. Holcomb,* 123 Cal. 84."

In *1 Bancroft's Pleading,* at page 283 it is said:

"It is a general rule that damages which naturally and necessarily arise from the breach of contract or other act complained of need not be stated, as they are covered by the general damages laid in the pleading, * * *."

In the complaint in paragraph III, it is alleged:

"Defendant stated to plaintiff that it would not receive or accept said Graver Tank No. 2 in part payment or in exchange for said steel products or allow plaintiff said credit of $27,000.00 therefor in part payment of said steel products and refused to furnish said steel products upon the terms stated in said agreement and repudiated and refused to abide by or perform said agreement, *all to plaintiff's damage in the sum of $19,200.00."* (Italics ours.) [Tr. p. 7.]

It is to be noted that in addition to the allegation of damage contained in the complaint plaintiff on demand of defendant furnished a bill of particulars, the sufficiency of which has never been questioned by defendant. [Tr. pp. 17, 18.]

The case of *Philip v. Durkee,* cited at page 7 of defendant's opening brief is not in point for the reason that in the case cited there was a *total absence* of *any allegation of damage even in general terms,* the court saying at page 302:

> "How much they are injured by the refusal of Durkee to permit them to complete the contract *is nowhere stated even in general terms.*" (Italics ours.)

(2) The Consent to the Overruling of a Demurrer Is a Waiver of Objections Raised by It.

Conniff v. Kahn, 54 Cal. 283;
Mecham v. McKay, 37 Cal. 154;
Carvell v. Cain, 16 Cal. 567;
Hansom v. Sherman, 25 Cal. App. 169; 143 Pac. 73;
Haley v. Nunan, 2 Cal. Unrep. 189.

At the time of the hearing of the demurrer to the complaint the District Court with the consent of defendant overruled the demurrer. Defendant is therefore concluded from claiming on appeal that it was error to overrule the demurrer. The following minute order was entered at the time of the hearing on the demurrer:

"This cause coming before the court at this time for hearing on demurrer; Attorney McComb of Messrs.

McComb & Hall appearing as counsel for the plaintiff, *pursuant to consent of counsel for the respective parties,* it is by the court ordered that the said demurrer be and the same is hereby overruled * * *." (Italics ours.) [Tr. p. 12.]

In the case of *Conniff v. Kahn,* 54 Cal. 283, at page 284, the court says:

> "The complaint was demurred to on the grounds, 1st. That it did not state facts sufficient to constitute a cause of action; and 2nd. That it was ambiguous, unintelligible, and uncertain. The order overruling the demurrer is as follows: 'On motion of plaintiff's attorneys, *defendant's attorney consenting thereto,* ordered, that the demurrer to the complaint herein be and the same is hereby overruled, with leave to the defendant to answer in ten days.' In his points and authorities, the counsel for appellant insists that the demurrer should have been sustained. If he had not consented to its being overruled, it would be the duty of this court to consider that point. As it is, we cannot regard it as before us on this appeal."

In the case of *Haley v. Nunan,* 2 Cal. Unrep. 189, defendant attempted to have reviewed on appeal the order overruling a general demurrer to the complaint. At page 189 the court said:

> "Upon motion of defendant's attorney a *general demurrer to the complaint* was overruled, with leave to answer. Yet it is now contended that the court erred in overruling the demurrer. But where a demurrer has been overruled at the request of the demurring party, he will not be heard, on an appeal from the judgment entered in the case, to question

the correctness of the ruling: Coryell v. Cain, 16 Cal. 568, Mecham v. McKay, 37 Cal. 154." (Italics ours.)

In the case of *Carvell v. Cain,* 16 Cal. 567, at page 572, the court says:

"The objections raised by the demurrer we do not notice, as the demurrer was overruled by *consent* of parties. A ruling made by consent cannot be the subject of consideration in this court." (Italics ours.)

In the case of *Mecham v. McKay,* 37 Cal. 154, at page 158, the court says:

"We have several times decided that we will not review, on appeal, judgments and orders entered by consent. (*Brotherton v. Hart,* 11 Cal. 405; *Corvell v. Cain,* 16 Cal. 502; *Sleeper v. Kelly,* 22 Cal. 456.)"

In the case of *Hanson v. Sherman,* 25 Cal. App. 169 (143 Pac. 73), in ruling upon a demurrer to the complaint the court says at page 172:

"The ambiguity and uncertainty, if any, existing in this allegation could have been corrected by the interposition of a special demurrer. *Such a demurrer was in fact interposed. The demurrer, however, was overruled with the express consent of the defendant.* This was tantamount to a withdrawal of the demurrer, in so far as it was grounded upon the ambiguities and uncertainties of the complaint. (Evans v. Gerken, 105 Cal. 311 (38 Pac. 725).)" (Italics ours.)

SECOND.

1.

The Court Did Not Err in Overruling Defendant's Motion for a Nonsuit Made at the Close of Plaintiff's Case.

(1) Error in Denying a Motion for a Nonsuit Made at the Close of Plaintiff's Case Is Waived and Is Not Assignable as Error in the Appellate Court When Defendant Thereafter Proceeds to Introduce Evidence on Its Own Behalf.

Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak, 7 Fed. (2d) 583;

American Film Co. v. Reilly, 278 Fed. 147;

Copper River & N. W. Ry. Co. v. Heney, 211 Fed. 459;

Coeur D'Alene Lumber Co. v. Goodwin, 181 Fed. 949;

Levy v. Larson, 167 Fed. 110;

Northwestern Steamship Co. v. Griggs, 146 Fed. 472;

Fulkerson v. Chisna Min. & Imp. Co., 122 Fed. 782.

In the case of *Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak,* 7 Fed. (2d) 583, at page 585, this court says:

> "The overruling of the motion for a nonsuit, having been *waived* by the defendants, *by adducing testimony after the denial thereof, is not assignable here as error,* nor is it reversible error to refuse to

hear argument where, as here, no prejudice resulted therefrom. 4 C. J. 960, and cases there cited." (Italics ours.)

In the case of *Copper River & N. W. Ry. Co. v. Heney,* 211 Fed. 458, at page 460, this court says:

> "We may pass by the defendant's motion for a nonsuit, made at the close of the plaintiff's evidence, the denial of which is assigned as error, for the defendants thereafter waived their motion by offering testimony in defense of the action."

In the case of *Levy v. Larson,* 167 Fed. 110, at page 111, this court says:

> "The rule is well settled that a motion for a nonsuit, upon which the party making it does not choose to stand, is waived by the subsequent introduction of evidence on his own behalf."

In the case of *Coeur D'Alene Lumber Co. v. Goodwin,* 181 Fed. 949, at page 951, this court says:

> "The motion for a nonsuit was waived by the defendant introducing its evidence after the motion was denied by the court."

In the case of *Northwestern Steamship Co. v. Griggs,* 146 Fed. 472, at page 474, this court says:

> "If the motion be treated as proper in form, it was waived by the defendant's proceeding to introduce evidence on its own behalf, instead of resting upon the motion, and the action of the court in respect to the motion cannot, therefore, be assigned for error here. Union Pacific Ry. Co. v. Daniels, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597;

Runkle v. Burnham, 153 U. S. 216, 222, 14 Sup. Ct. 837, 38 L. Ed. 694."

In the case of *Fulkerson v. Chisna Min. & Imp. Co.*, 122 Fed. 782, at page 784, this court says:

> "The exception of the defendants to the order overruling their motion for a nonsuit was followed by evidence on their part in defense of the action, which waived the exception, and precluded their assigning the ruling for error, even if the motion be regarded as appropriate to the nature of the action. Union Pacific Railroad Company v. Daniels, 152 U. S. 684, 687, 14 Sup. Ct. 756, 38 L. Ed. 597; Columbia & Puget Sound Railroad v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; Union Pacific Railroad Company v. Callaghan, 161 U. S. 91, 95; 16 Sup. Ct. 493, 40 L. Ed. 628."

Applying the foregoing rules to the case at bar it appears that defendant has waived any right to urge error in the District Court's overruling its motion for a nonsuit since after the motion for a nonsuit was denied defendant proceeded to introduce evidence in its own behalf. [Tr. p. 73, *et seq.*]

(2) A Motion for Nonsuit at Close of Plaintiff's Case Will Not Be Granted Unless Specific Grounds on Which Motion Was Made Are Stated.

Adams v. Shirk, 104 Fed. 54;
Mattson v. Mattson, 181 Cal. 44; 183 Pac. 443;
Brown v. Sterling Furniture Co., 175 Cal. 563; 166 Pac. 322;
Scott v. Sciaroni, 66 Cal. App. 577; 226 Pac. 827;

Henley v. Bursell, 61 Cal. App. 511; 215 Pac. 114;
Coghlan v. Quartararo, 15 Cal. App. 662; 115 Pac. 664;
Brown v. Warren, 16 Nevada, 228.

In the case of *Adams v. Shirk,* 104 Fed. 54, at page 58, the court says:

> "The bill of exceptions states simply that, all the evidence being in, 'thereupon the defendant moved the court to *hold the evidence insufficient to sustain the action,* and to direct a verdict for the defendant'; but such a general motion, unaccompanied by a statement or suggestion of reasons for it, may properly be overruled. A practice is not to be approved which will permit of the presentation for review by this court of questions which are not shown to have been called to the attention of the trial court. Columbus Const. Co. v. Crane Co., *supra;* Stewart v. Morris, 37 C. C. A. 562, 96 Fed. 703." (Italics ours.)

In the case of *Henley v. Bursell,* 61 Cal. App. 511 (215 Pac. 114), at page 517, the court says:

> "Another reason why the trial court should have denied the motion is found in the circumstance that *there was no specification of the grounds of the motion.* The record shows that 'the motion for nonsuit was made on behalf of defendants upon the ground that plaintiff had failed to prove a sufficient case.' In *Daley v. Russ,* 86 Cal. 114 (24 Pac. 867), it is said: *'It is undoubtedly the settled rule that a motion for nonsuit should specify the grounds upon which it is made, and ordinarily a ground which is not stated cannot be considered.'"* (Italics ours.)

In the case of *Scott v. Sciaroni,* 66 Cal. App. 577 (226 Pac. 827), at page 581, the court says:

> "Respondent contends that the judgment of nonsuit was properly entered on the ground of insufficiency of the complaint in various particulars. There are two answers to this contention. First, *the grounds now urged were not stated in the motion for a nonsuit* and, second, insufficiency of the complaint is not a statutory ground for granting a nonsuit." (Italics ours.)

In the case of *Brown v. Sterling Furniture Co.,* 175 Cal. 563 (166 Pac. 322), at page 564, the court says:

> "No change, however, has been worked in the uniform and settled law of this state that the party moving for a nonsuit must state in his motion *precisely the grounds upon which he relies.*" (Italics ours.)

In the case of *Coghlan v. Quartararo,* 15 Cal. App. 662 (115 Pac. 664), at page 668, the court says:

> "The request of appellant should probably be treated as a motion for a nonsuit, though not so denominated in the motion, and as such it was properly denied.
>
> Similar motions were made for similar rulings as to the other plaintiffs, *but the grounds of the motions were not stated, except generally that the particular plaintiff had failed to prove his case,* and that 'a corporation as a sub-contractor had no lien under the law.'" (Italics ours.)

In the case of *Mattson v. Mattson,* 181 Cal. 44 (183 Pac. 443), at page 46, the court says:

> "The motion was denied by the court and defendant assigns this as error. (3) It is well established in this state that a motion for nonsuit will not be granted unless the *specific grounds* on which such motion is made are stated. (Coffey v. Greenfield, 62 Cal. 602; Miller v. Luco, 80 Cal. 257 (22 Pac. 195); Drufee v. Seale, 139 Cal. 604 (73 Pac. 435).)" (Italics ours.)

In the case of *Brown v. Warren*, 16 Nevada, 228, at page 239, the court says:

> "If defendants intended to rely upon the ground now urged in their motion for nonsuit, they would have so stated distinctly at the time, and failing to do so, under the circumstances, they waived the point. (*Mateer v. Brown*, 1 Cal. 222; *Baker v. Joseph*, 16 Id. 180; *Kiler v. Kimbal*, 10 Id. 268.)"

Assuming for the purpose of argument that appellant had not waived its right to present the trial court's ruling on its motion for a nonsuit to the Appellate Court for review, nevertheless, the trial court's ruling was correct, for the reason that the grounds now stated as a basis for sustaining the motion were not stated at the time the motion was made in the trial court. The defendant now claims that the motion should have been granted because there was no competent evidence at the close of plaintiff's case to support the allegations of the complaint:

"1. That there was any contract between the parties;

2. That plaintiff had ever produced to defendant 'due evidence' or any evidence whatsoever of title to Tank No. 2;

3. That there had been any breach of contract;

4. That plaintiff had suffered any injury." (Opening Brief p. 13.)

None of these grounds were called to the attention of the District Court at the time the motion for nonsuit was made.

The defendant's motion for a nonsuit being on the following grounds:

(1) That plaintiff had not established facts sufficient to enable it to recover.

(2) That plaintiff had not proved or established the essential allegations of the complaint.

(3) That it did not appear that the contract alleged in the complaint was ever executed or existed between plaintiff and defendant. [Tr. p. 73.]

In the case of *Henley v. Bursell (supra)* the ground of the motion for a nonsuit was: *"that plaintiff had failed to prove a sufficient case."* The appellate court in reviewing the alleged error of the trial court in denying the motion for a nonsuit said at page 517:

> "Another reason why the trial court should have denied the motion is found in the circumstance that there was no specification of the grounds of the motion."

Again, in the case of *Coghlan v. Quartararo (supra)* the ground of the motion for a nonsuit was:

> "That the particular plaintiff had failed to prove his case and 'a corporation as a sub-contractor had no lien under the law'."

The appellate court in affirming the ruling of the lower court in denying the motion for a nonsuit said at page 668:

> "The request of appellant should probably be treated as a motion for a nonsuit though not so

> denominated in the motion and as such it was properly denied. * * * But the grounds of the motion were not stated, except generally that the particular plaintiff had failed to prove his case. * * *"

It is therefore apparent that the first and second grounds stated by defendant in its motion for a nonsuit are almost identical with the grounds stated in *Henley v. Bursell (supra)* and *Coghlan v. Quartarano (supra)*, and therefore as to these grounds the motion in the case at bar was properly denied.

(3) A Motion for a Nonsuit Admits the Truth of Plaintiff's Evidence and Every Inference of Fact That Can Be Legitimately Drawn Therefrom and the Evidence Must Be Interpreted Most Strongly Against the Defendant.

Sandidge v. Atchison T. & S. F. Ry. Co., 193 Fed. 867;

Southern Pac. Co. v. Swanson, 238 Pac. 736.

In the case of *Sandidge v. Atchison T. & S. F. Ry. Co.*, 193 Fed. 867, the District Court granted defendants' motion for a nonsuit. This Circuit Court of Appeals in reversing the decision of the District Court says at page 874:

> "The plaintiff was entitled to have this evidence, with all the inferences properly deducible therefrom, considered in the light most favorable to her cause of action. Kreigh v. Westinghouse & Co., 214 U. S. 249, 256, 29 Sup. Ct. 619, 53 L. Ed. 984; Masner v. Atchison T. & S. F. Ry. Co., 177 Fed. 618, 621, 101 C. C. A. 244."

In the case of *Southern Pac. Co. v. Swanson,* 238 Pac. 736, at page 737, the court says:

> "We are of the opinion that the trial court erred in granting the motion. The court's power and limitations with reference to the granting of a nonsuit are clear and well defined. *The motion admits the truth of plaintiff's evidence and every inference which can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant.* Stieglitz v. Settle, 175 Cal. 131, 165 Pac. 436; Goldstone v. Merchants Cold Storage Co., 123 Cal. 625, 56 Pac. 776; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Bloom v. Allen, 61 Cal. App. 28, 214 Pac. 481." (Italics ours.)

Applying the foregoing rules to the instant case, defendant's motion for a nonsuit on the third ground, *i. e., that it did not appear that the contract alleged in the complaint was ever executed or existed between plaintiff and defendant* was properly denied for the reason that the District Court in deciding this motion must have disregarded all evidence unfavorable to plaintiff and considered all evidence favorable to plaintiff. *There was evidence that S. Reid Holland was the duly authorized agent of the defendant and that he was authorized in writing to execute the contract between plaintiff and defendant.* At the close of plaintiff's case and at the time the motion for a nonsuit was made by defendant there was in evidence the contract between plaintiff and defendant, also the testimony of C. R. Bird, Andrew Mattei, Jr., and H. P. Grimm that the contract had been executed in their presence by S. Reid Holland who had shown them a letter from the defendant authorizing him to act as its agent. [Tr. pp. 60, 61, 62, 69, 70, 71.]

2.

The Court Did Not Err in Denying Defendant's Motion to Strike Out Certain Exhibits and Other Evidence Introduced by Plaintiff, Made at the End of Plaintiff's Case.

(1) A Motion to Strike Out Testimony Must Be Directed With Precision to the Testimony Which the Moving Party Desires the Court to Eliminate.

Chicago Great Western Ry. Co. v. M'Donough, 161 Fed. 657;
Lucy v. Davis, 163 Cal. 611; 126 Pac. 490;
Powley v. Swensen, 146 Cal. 471; 80 Pac. 722;
Traynor v. McGilvray, 54 Cal. App. 31; 200 Pac. 1056;
Miller v. Davis, 187 N. W. 433.

In the case of *Lucy v. Davis,* 163 Cal. 611 (126 Pac. 490), at page 615, the court says:

> "After Mrs. Lucy's deposition was read a motion to strike it out was made. This was based upon the ground that practically all of her testimony appeared on cross-examination to be 'based upon hearsay'. This objection was too indefinite. She testified positively that some payments were made by her to the corporation mentioned in the book then in court, and as the court stated in ruling that it was the book other parts of which had been introduced in evidence, the book and her payments also were thus identified as connected with the Renters Loan and Trust Company. The objection to the admission of the book in evidence, as well as the vague and general motion to strike out her testimony, were prop-

erly overruled. *A motion to be available must be directed with precision to the testimony which the moving party desires the court to eliminate.* (Wadleigh v. Phelps, 149 Cal. 644 (87 Pac. 93).)" (Italics ours.)

In the case of *Traynor v. McGilvray*, 54 Cal. App. 31 (200 Pac. 1056), at page 35, the court says:

"A little later, and before ruling upon this motion, Mr. Hanlon renewed it as follows: 'Mr. Hanlon: I move to strike out the conversation between Mr. McGilvray, our opponent, and this witness in our absence.' The court denied both motions, and its action in so doing is assailed as error.

We cannot give our assent to the appellants' contention in this regard. No ground of objection to this offered evidence was stated in either of said motions, except possibly that the conversation was objected to as in the absence of the plaintiff. This would not be a good objection to that portion of the witness' conversation with McGilvray wherein he asked her to be his intermediary in proferring his aid to the plaintiff; (3) and as to what he said otherwise as to his own previous offer of aid to the plaintiff, *the objection was not confined to this probably objectionable portion of the witness' testimony, but went to the whole statement of the witness*, a portion of which was clearly admissible. It was not, therefore, error of the trial court to deny the plaintiff's motions to strike out the whole of this testimony in the form in which such motions were made. (*Hellman v. McWilliams*, 70 Cal. 449 (11 Pac. 659); *Lucy v. Davis*, 163 Cal. 611 (126 Pac. 490); *Estate of Huston*, 163 Cal. 166 (124 Pac. 852).)"

In 38 Cyclopedia of Law and Procedure at page 1404 it is said:

> *"A motion to strike out must be so specific that there can be no mistake as to what evidence is sought to be stricken out.* It should set out the exact testimony sought to be stricken out. It must be confined to the improper testimony and must separate the proper evidence from the improper with such certainty as to leave no doubt as to the evidence challenged." (Italics ours.)

In the case of *Chicago Great Western Ry. Co. v. M'Donough,* 161 Fed. 657, at page 671, the court says:

> "But in our opinion the defendant is not in a position to complain that this evidence was admitted or that it was not stricken out. The objection interposed when the after condition of the flues was about to be shown was not tenable, because it was nothing less than an assertion that no evidence of that character was admissible for the purpose indicated, which was not the case, as the authorities amply show. Droney v. Doherty, 186 Mass. 205, 71 N. E. 547; Creamery Package Mfg. Co. v. Hotsenpiller, 159 Ind. 99, 64 N. E. 600; 1 Wigmore Ev. Sec. 437. And the *motion to strike out was in terms directed against 'all evidence'* of that character, and so covered that relating to the pitted, blistered and burned conditon of some of the flues, as well as that which it is now said was objectionable. To have sustained the motion in the terms in which it was made would undoubtedly have been error, and yet the court was not bound to do more than to respond to it as made. As has been well said: 'Courts of justice are not obligated to modify the propositions submitted by counsel, so as to make them fit the

case. If they do not fit, that is enough to authorize their rejection.' Elliott v. Piersol, 1 Pet. (U. S.) 328, 338, 7 L. Ed. 164." (Italics ours.)

In the case of *Powley v. Swensen,* 146 Cal. 471 (80 Pac. 722), at page 477 the court says:

"2. At the close of plaintiffs' evidence defendants moved to strike out *all the testimony* of City Engineer Dockweiler, on the ground that it had not been shown that the retaining wall was built in accordance with the plans and specifications prepared in his office. The court denied the motion. * * *

* * * But the ruling was correct on other grounds. Witness Dockweiler had testified to the condition and stratification of the earth above the tunnel; to the pitch of the shale toward the wall; to the loosening effect of water permeating this body of earth and shale; to the additional pressure and force of a moving body of earth. and other facts. *The motion was too general, for some of the testimony was clearly admissible regardless of the point made by defendants. The motion should have been directed with precision to the objectionable testimony if there was such.* (Hellman v. McWilliams, 70 Cal. 449.)" (Italics ours.)

In the case of *Miller v. Davis,* 187 N. W. 433, at page 434 the court says:

"According to the abstract, the evidence went in without objection, and after the witnesses had testified as to the value of hauling and cutting, and had given testimony on other subjects, *defendant moved to exclude all the testimony of this witness relating to the fair value for the hauling and cutting of the timber in the fall of 1917, as incompetent, ir-*

*relevant, and immaterial, and the witness incompetent. * * * Furthermore, the objection made in the motion to exclude is not sufficiently specific. It must be specific when the objection is overruled.* State v. Wilson, 157 Iowa 698, 713, 141 N. W. 337; Harvey v. Railway, 129 Iowa 465, 482, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483; State v. Madden, *supra.*" (Italics ours.)

In the case of *Perazzo v. Ortega,* 241 Pac. 518, at page 519 the court says:

"The witness had testified to a number of things, part of which she saw herself, and part of which she heard from other persons, and counsel for the defense, after the testimony had been completed, made the following motion:

'I move to strike out all the evidence of this witness with reference to this dog attacking this colored woman as hearsay.'

Part of the evidence was admissible and part was objectionable, but it was not the duty of the court to separate it, and, counsel having made his motion in these general terms, it was properly overruled." (Italics ours.)

In the case of *Wadleigh v. Phelps,* 149 Cal. 627 (87 Pac. 93), at page 644, the court says:

"The *motion to strike out,* made subsequent to the amendments to the answer eliminating the issues as to such other deeds, *was too broad,* being a motion to strike out *all letters,* including those written subsequent to November 13, 1894, and was properly denied, regardless of the question as to whether the earlier letters were proper evidence upon the issue as to the mining property." (Italics ours.)

In the case of *Mount Vernon Brewing Co. v. Oscar Teschner,* 69 Atl. 702, the following motion to strike out testimony was denied:

> "To strike out all the testimony on the direct examination which was in regard to any correspondence or conversation had between the appellee and J. E. Newman & Co.; that it be stricken out on the ground that the correspondence had not been produced and we had not had the opportunity to examine the witness on it,"

the court saying in passing upon the motion, at page 704:

> "Then this motion was too broad, as it not only included the copy of the letter spoken of, which had been admitted without objection, but it also included conversations."

(2) It Is Not Error to Deny a Motion to Strike Out Testimony in the Absence of a Statement by Counsel of the Grounds Upon Which the Motion Is Made.

Central Vermont R. Co. v. Ruggles, 75 Fed. 953;
Gaffney v. Mentele, 119 N. W. 1030;
City of Chicago v. Seben, 46 N. E. 244;
In re Evans' Estate, 86 N. W. 283.

In the case of *Central Vermont R. Co. v. Ruggles,* 75 Fed. 953, at page 958, the court says:

> "Thereupon the counsel for the defendant below moved that these three answers be stricken out, but he failed to state his reason therefor, and failed, therefore, to lav the foundation for exceptions according to the general rules touching such matters."

In the case of *Gaffney v. Mentele,* 119 N. W. 1030, at page 1031, the court says:

> "Furthermore, the motion to strike out testimony of witness T. H. Gaffney was not certain and definite. It was in the following words, 'Defendant moves to strike out this witness' testimony with reference to the payment of money,' without giving any reason why it should be stricken."

In the case of *City of Chicago v. Seben,* 46 N. E. 244, at page 245, the court says:

> "Where the defendant moves to strike out plaintiff's evidence on the ground of variance, it is incumbent on him to point out in what the variance consists, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to amend his declaration, so as to make it conform to the proof, and to avoid defeat upon a point not involving the merits of the claim. Railway Co. v. Ward, 135 Ill. 511, 26 N. E. 520; Libby v. Scherman, 146 Ill. 540, 34 N. E. 801."

In the case of *In re Evans' Estate,* 86 N. W. 283, at page 283, the court says:

> "Proponents moved to strike out a certain statement made by the deceased to his wife before the divorce, but gave no reasons therefor; and they also moved to strike out all communications made by husband to wife, without pointing out the communications objected to. The motion was made after the wife had given a great deal of evidence, some of which was competent, as relating to the appearance, demeanor, and conduct of the husband, and some of which was incompetent for the reasons suggested. *Such an omnibus motion will not be regarded, especially when, as in this case, no grounds for the motion are stated."* (Italics ours.)

In the case at bar defendant's motion to strike out was in the following language:

"Defendant here moved the court to strike out the various matters and things read by plaintiff's counsel from depositions and exhibits tendered or offered in evidence herein, upon the ground that the same had not been connected up, or a foundation laid therefor, as counsel represented it would be laid." [Tr. p. 73.]

Apply the foregoing rules to defendant's motion to strike it appears that it was properly denied for the reasons, First: That defendant's motion did not specify the objectionable portions of the evidence that defendant wished stricken from the record and, Second: That the grounds of the motion were not stated with such precision as to enable the District Court to pass upon the alleged defects or permit plaintiff to introduce evidence to correct them.

THIRD.

1.

The Court Did Not Err in Admitting in Evidence the Following Exhibits: 6, 102, 103, 79, "A", 10, 11, 38, 16, 37, 39, 138, 139, 142, and 144.

(1) Where Portions of a Document Offered in Evidence Are Admissible a General Objection to the Entire Document Does Not Authorize Its Exclusion.

Osley v. Adams, 268 Fed. 114;
Southern Pac. Co. v. Stevens, 258 Fed. 165;
Estate of De Laveaga, 165 Cal. 607; 133 Pac. 307;
10 Cal. Jur., 822.

In the case of *Southern Pac. Co. v. Stevens*, 258 Fed. 165, at page 166, the court says:

> "It is contended that it was error to admit in evidence certain exhibits, to which objection was made, on the ground that they were self-serving, incompetent, immaterial, and irrelevant. * * * It was proper for the plaintiffs to show that they were making every effort to obtain cars from the defendant and were advising them of the importance of having the cars on hand. *If there were any self-serving statements in the dispatch, objections should have been directed specifically to these portions thereof, not to the whole body of the dispatch.*" (Italics ours.)

In the case of *Osley v. Adams*, 268 Fed. 114, the court says at page 116:

> "The objection to the reception in evidence of the record in the bankruptcy proceedings is clearly without merit. No exception was taken to the report of the master on this ground. The report was admissible for a number of purposes. Much of it consisted of original evidences of debt, showing their dates. *If any part of the record was inadmissible, it should have been particularly objected to.*" (Italics ours.)

In the case of *Estate of De Laveaga*, 165 Cal. 607 (133 Pac. 307), at page 635 the court says:

> "Contestant's Exhibits 205 and 206, being two letters from Ignacia to Miguel; as in the case of contestant's Exhibit 39, under heading 'D,' *both of these letters were in part admissible as a portion of the line of evidence showing the actual transaction* of the business of deceased by her relatives, even

that business relating to the receipt and expenditure of moneys for her own personal needs. As to the letter of January 21, 1887, a portion of which was 'for you know her and to go to sign it at the bank or before a clerk the poor thing suffers,' *this being the only portion as to which objection may reasonably be made, the objection of incompetency was to the whole letter, and was therefore properly overruled.*" (Italics ours.)

In 10 Cal. Jur., 822, the author says:

"So where it is objected generally that evidence is 'irrelevant, incompetent and immaterial,' without specification being made of the point in which the evidence is insufficient, the objection should be overruled if it is admissible for any purpose. *Thus, where part of a letter offered in evidence is admissible, the remainder being incompetent, an objection of incompetency directed to the whole letter is properly overruled.*" (Italics ours.)

In connection with these exhibits it is to be noted that there was an issue before the district court as to whether or not defendant had engaged in business in California. Paragraph I of the complaint alleges in part as follows: "that defendant is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the state of Illinois and *doing business within the state of California;*" (Italics ours.) [Tr. p. 5.]

The foregoing portion of paragraph I is denied by paragraph I of the answer, which reads as follows:

"Defendant *denies* that during any or all of the times mentioned in the complaint, *it was, or is now, doing business within the state of California.*" (Italics ours.) [Tr. p. 13.]

a.

EXHIBITS 6 AND 10 WERE PROPERLY ADMITTED.

Exhibit 6 was a letter from the defendant to S. Reid Holland and contains this statement:

"*All of our agents* are handled in a like manner, and in view of the fact that we have been universally successful in our arrangements with them I can see no reason whatsoever why the same sort of an agreement should not be acceptable and work satisfactorily in *your case.*

Yours very truly,
Manager Tank Sales."

(Italics ours.) [Tr. p. 34.]

Exhibit 10, a letter from the vice-president of the Graver Corporation to S. Reid Holland, contains these statements:

"We are not very well pleased with the way *you have handled this item.*" (Italics ours.) [Tr. p. 49.]

"Whatever percentage of the total contract the customer pays on account, this will be your percentage against your total commission. Also all customers' accounts are to be paid direct to us by the customer. This is our regular rule that is followed by *all of our men.*" (Italics ours.) [Tr. p. 51.]

These statements were undoubtedly admissible and relevant as evidence of the fact that S. Reid Holland was the agent of the defendant in the state of California.

b.

EXHIBITS 102 AND 103 WERE PROPERLY ADMITTED.

Both Exhibits 102 and 103 referred to the contract between defendant and Geo. F. Getty, the subject matter

of which was "Graver Tank No. 2," and were sent to Geo. F. Getty and Thompson Holland Company during the negotiations between Getty and defendant for the settlement of their differences.

Exhibit 102 reads in part as follows:

"We are not inclined to take advantage of this situation and would recommend leniency on your part also.

Graver Corporation."

[Tr. p. 41.]

This portion of Exhibit 102 is a clear recognition by defendant of the fact that the settlement with Geo. F. Getty regarding "Graver Tank No. 2" was entirely in Holland's hands.

Exhibit 103 reads as follows:

"To Geo. F. Getty,
536 Union Oil Bldg.,
Los Angeles, California.

Wired Thompson Holland Night letter advising extent of damage *if your order is cancelled please handle settlement thru them.*

Graver Corporation."

(Italics ours.) [Tr. p. 41.]

It is clear that this telegram to Getty directly authorizes Holland to make a settlement regarding "Graver Tank No. 2."

c.

Exhibits 79 and 11 Were Properly Admitted.

Exhibit 79 showed as defendant states in its opening brief at page 19:

"That at some time plaintiff in error (defendant) had received through Holland a certain order from a third party."

This third party was Geo. F. Getty whom the evidence shows was a resident and did business in Los Angeles, California. It is therefore competent evidence as tending to prove the allegation of paragraph I of the complaint denied by defendant's answer that defendant was doing business in California.

Exhibit 11 reads in part as follows:

"stop was elected director yesterday mercury refinery which enables me to better protect *our* White Star interests.

S. Reid Holland."

(Italics ours.) [Tr. p. 54.]

This exhibit is evidence of the fact that Holland was representing the Graver Corporation as he refers in his telegram to protecting *"our White Star interests."* It is further evidence of the fact, denied by defendant, that defendant was doing business in the state of California.

d.

EXHIBIT "A" WAS PROPERLY ADMITTED.

This exhibit which was duly identified [Tr. p. 44], shows according to the testimony of W. F. Graver, vice-president and treasurer of the defendant, that the check received from Geo. F. Getty in consideration of the execution of the contract between Geo. F. Getty and Graver Corporation, Exhibit 2 [Tr. p. 63], was accepted by the defendant and placed to the credit of Geo. F. Getty on account of the balance due on "Graver Tank No. 2." [Tr. p. 46.]

The evidence tended to show that the defendant accepted the benefits of its agent's act and knew of his

negotiations with Geo. F. Getty, which, as Exhibit 2 shows, provided for the contract between the plaintiff and defendant. Exhibit 2, which was the contract between defendant and Geo. F. Getty, reads in part as follows:

"that I will on the part of the Graver Corporation, agree to the execution of *a contract between the Graver Corporation and the Hercules Gasoline Company to supplement an equivalent in tonnage viz., $27,000.00 in fabricated steel to be shipped on or before August first, 1924*, and at the prevailing price of such steel and that such agreement shall provide for the erection of the said steel at prevailing price for such erection, but in no case to be less than $9,000.00, it being the sense of this agreement that this exchange is to supplement the full contract price for the erection of tank number two, at Santa Fe Springs, Calif., viz., $36,000.00." (Italics ours.) [Tr. p. 64.]

e.

EXHIBIT 38 WAS PROPERLY ADMITTED.

This exhibit contains the following statement.

"*Hercules agreed and did purchase tank #2 and at this writing it is their property.* * * * Please bear in mind that in endeavoring to work out this solution I had in mind the final settlement for you on the Getty account and I feel that the transaction with the Hercules Company will be a good one for us as they are going to need considerably more equipment and storage." Italics ours.) [Tr. pp. 56, 57.]

This statement is evidence of the fact that the plaintiff acquired and furnished to the defendant due evidence of having acquired title to "Graver Tank No. 2;" further

that defendant and defendant's agent had knowledge of this fact.

It is to be noted that in this letter Holland transmitted to the defendant the contract which is the basis of this suit, to-wit, Exhibit 1, and also the contract between defendant and Geo. F. Getty, Exhibit 2. It is apparently in answer to this letter from Holland that defendant wrote to Holland April 2, 1924, in part as follows:

"So far, we have done nothing on the Hercules contract, and can do nothing until this tank matter is settled. We do not know much about the Hercules Company credit, but W. F. is to look this up while he is in California. It looks as if you will have to play a fine Italian hand with the Hercules Company to keep from getting us in bad, and I want you to keep us posted regarding the situation.

Yours very truly,
Graver Corporation
PSG:AJ Vice-President."
[Tr. pp. 52, 53.]

f.

EXHIBITS 16, 37, 39, 138, 139, 142 AND 144 ARE EVIDENCE OF THE FACT THAT THE GRAVER CORPORATION WAS AND HAD BEEN DOING BUSINESS IN THE STATE OF CALIFORNIA AND HAD RECOGNIZED S. REID HOLLAND AS ITS AGENT AT LOS ANGELES.

Phil S. Graver, vice-president and chairman of the board of directors of the defendant testified in identifying these exhibits as follows:

" 'Holland had specifications and inter-office correspondence and contract forms. Exhibits A-1, A-B-2 and

2-A annexed to the deposition are on forms supplied by our sales department. Holland never discussed with me the question of placing the name of Graver Corporation on his stationery; it is a general custom, however, among our engineering agents to put our name on their letterheads to cover items that they sell.'" [Tr. p. 58.]

These exhibits are evidence of the fact that S. Reid Holland was the agent of defendant in California.

2.

The Court Did Not Err in Admitting in Evidence Statements of S. Reid Holland Regarding His Authority to Represent the Defendant.

(1) Where an Agency Is Otherwise Prima Facie Proved, the Declarations of the Agent Are Admissible as Corroboration.

In the case of *Hope Mining Co. v. Burger,* 37 Cal. App. 239 (174 Pac. 932), at page 244 the court says:

> "*Where the agency is otherwise prima facie proved the declarations of the alleged agent are admissible in corroboration* where they constitute a part of the *res gestae* and were made at the time of the transaction in question. They are admissible to show that the agent acted as such and not on his individual account, and *also to show the nature and extent of his authority.* (Robinson v. American Fish, etc. Co., 17 Cal. App. 212 (119 Pac. 388); 2 C. J., p. 930.)" (Italics ours.)

(2) An Objection to a Question on the Grounds That It Is Immaterial, Irrelevant and Incompetent Is Insufficient if the Particular Fault Relied Upon Is Not Otherwise Pointed Out.

New York Electric Equipment Co. v. Blair, 79 Fed. 896;

McCann v. Children's Home Society, 176 Cal. 359, 168 Pac. 355;

Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307;

19 Cal. Jur., 822;

1 Wigmore on Evidence, 2nd Edition, 181.

In the case of *New York Electric Equipment Co. v. Blair,* 79 Fed. 896, at page 898, the court says:

> "One question was objected to as immaterial, *irrelevant, and incompetent.* The point is now made that the testimony was incompetent, because competent testimony must be predicated upon facts explicitly stated and communicated to the jury. This objection is valueless for at least two reasons. The first is that the objection, when taken, *did not state the particular fault* which is now relied upon, and which, if stated at the trial and if true, could easily have been obviated. The alleged error is a specimen of a practice not to be encouraged, which is to object with a rattle of words that conceal the real nature of an objection capable of being removed on the spot, and to announce its true character for the first time in the Appellate Court. In Noonan v. Mining Co., 121 U. S. 393, 7 Sup. Ct. 911, the introduction of articles of incorporation was objected to because they were 'immaterial, irrelevant, and incompetent' evidence. Upon the specific objection, which was urged upon the writ of error, that they were not

sufficiently authenticated to be admissible, Mr. Justice Field said:

> *'The objection "incompetent, immaterial, and irrelevant" is not specific enough.* The rule is universal that, when an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not be obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances this can be done.'" (Italics ours.)

In the case of *McCann v. Children's Home Society,* 176 Cal. 359 (168 Pac. 355), at page 368, the court says:

> "A physician, having qualified as an expert, after stating that he had heard or read all of the evidence introduced on behalf of the plaintiff, was allowed, over objection, to give his opinion that the grantor was of sound mind. It may be conceded that this is not a proper method of eliciting the opinion of an expert. *(People v. Le Doux,* 155 Cal. 535, 555, (102 Pac. 517).) *But the particular objection which counsel now urges was not stated in the court below, the objection being on general grounds."* (Italics ours.)

In *10 Cal. Jur.,* 822, the author says:

> "So, where it is objected generally that evidence is 'irrelevant, incompetent and immaterial,' without specification being made of the point in which the evidence is insufficient, the objection should be over-

ruled if it is admissible for any purpose. Thus, where part of a letter offered in evidence is admissible, the remainder being incompetent, an objection of incompetency directed to the whole letter is properly overruled. If, however, the offered evidence is inadmissible for any purpose, a general objection is sufficient."

In the case of *Estate of De Laveaga*, 165 Cal. 607 (133 Pac. 307), at page 635, the court says:

"Contestant's Exhibits 205 and 206, being two letters from Ignacia to Miguel: As in the case of contestant's Exhibit 39, under heading 'D', both of these letters were in part admissible as a portion of the line of evidence showing the actual transaction of the business of deceased by her relatives, even that business relating to the receipt and expenditure of moneys for her own personal needs. As to the letter of January 21, 1887, a portion of which was 'for you know her and to go to sign it at the bank or before a clerk the poor thing suffers,' this being the only portion as to which objection may reasonably be made, *the objection of incompetency was to the whole letter, and was therefore properly overruled.*" (Italics ours.)

In *1 Wigmore on Evidence,* 2nd Edition, page 181, it is said:

"(1) *General Objection.* The cardinal principle (no sooner repeated by courts than it is ignored by counsel) is that a *general objection, if overruled,* cannot avail:"

In the case at bar there was an abundance of evidence introduced prior to the testimony objected to, that, uncontradicted, proved *prima facie* that S. Reid Holland

was the agent of the defendant. For example, Exhibit 103 [Tr. p. 41], directing Geo. F. Getty to handle the transaction in regard to "Graver Tank No. 2" through S. Reid Holland. Again, Exhibit 11 [Tr. p. 53], where there is evidence that S. Reid Holland was elected a director of the Mercury Refining Company to represent the defendant. Therefore, even though the objection had been raised that statements of an agent as to his authority were not admissible, the evidence objected to in this case was admissible within the rule stated in the case of Hope Mining Company v. Berger *(supra)*.

However, the defendant may not now urge for the first time, that the evidence was not admissible, for the reason that the only objection made to the admission of this testimony was in the following words:

"This was objected to on the ground it is incompetent, irrelevant and immaterial." [Tr. p. 61.]

There is no mention made in the objection that it is not competent for an agent to testify regarding the scope of his authority. Therefore, as stated in the case of New York Electric Equipment Company v. Blair, *supra:*

> "The objection 'incompetent, immaterial, and irrelevant' is not specific enough. The rule is universal that, when an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, * * *."

(3) An Objection That Evidence Is Incompetent, Irrelevant and Immaterial Does Not Raise the Question That the Evidence Was Objectionable Because a Conclusion of the Witness.

In the case of *Tanner, et al. v. Harper,* 75 Pac. 404, at page 405, it is said:

> "In these circumstances it cannot be successfully urged that the answer was not responsive to the question. The principal objection now called to our attention is that the answer did not state facts, but the *opinion of the witness*, which was *improper. That objection was not called to the attention of the trial court by the motion made, and cannot be raised for the first time on review."* (Italics ours.)

In the case of *Roth Shoe Mfg. Co. v. Kartus,* 99 Southern 772, at page 774, the court says:

> "Over the objection and exception of plaintiff defendant's counsel was permitted to ask the defendant, as a witness:
>
> 'At the time this contract was made, I will ask you if this Mr. Mattox (plaintiff's salesman who made the contract with defendant) made any representation to you as to what the contract contained and if so what?'
>
> The objections on the trial were general and now for the first time the insistence is made that the question called for a conclusion. The question does not call for evidence that is either illegal, immaterial, or irrelevant; the answer is germane to the only issue involved in the plea. Neither does it call for a conclusion, *but, if this were a fact, that question could not now be considered, not having been assigned on the trial.* Jefferson v. Rep. I. & S. Co.,

208 Ala. 143, 93 South. 890. The foregoing also applies to assignment 6.

The objection to question and motion to exclude answer, made the basis of assignments 7 and 8, were general and not here and now reviewable on specific grounds not stated on the trial. Authorities, *supra.*" (Italics ours.)

In the case of *Jefferson v. Republic Iron & Steel Co.*, 93 Southern, 890, at page 893, the court says:

"The objection to the question to witness Hooper, 'Is that grade of that dynamite there a good trade?' referring to the kind and grade of dynamite defendant furnished to its employes at the time of plaintiff's injury, was that it 'called for illegal, irrelevant, and immaterial testimony.' Under the issues of the case, this was merely a general objection, and presented nothing for review."

3.

The Trial Court Did Not Err in Refusing to Strike Out Evidence Regarding the Contents of the Lost Letter Written by the Defendant to S. Reid Holland Authorizing Holland to Represent Defendant on the Pacific Coast.

A. There Was Proof of the Loss of the Letter.

S. Reid Holland who was served with a subpoena *duces tecum* stated that he did not have the letter referred to in his possession and that he had looked every place where he ordinarily kept letters and could not locate it. [Tr. p. 66.]

B. There Was Proof of the Due Execution of the Letter.

C. R. Bird testified on direct examination as follows:

"In the course of this conversation Mr. Mattei brought up the question as to whether Holland had authority to act for Graver, and he produced a letter written on a Graver letterhead *signed Graver Corporation by W. F. Graver.*" (Italics ours.) [Tr. p. 61.]

Again, H. P. Grimm testified on direct examination as follows:

"Holland said several times that he did, and said he had a letter and he showed us a letter *from Graver Corporation* on their stationery *signed by one of the Gravers,* tending to show Holland had authority to act for Graver Corporation." (Italics ours.) [Tr. p. 69.]

"I remember the letter distinctly because Holland said, 'Here is a letter from Graver Corporation with their heading on,' tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with the signature on. I saw the whole letter; *it was signed by one of the Gravers* whose initials begin with a 'W'." (Italics ours.) [Tr. p. 70.]

Andrew Mattei, Jr., testified as follows:

"The contents of that portion was that Holland had full authority to act for Graver in and around Los Angeles; it was *signed Graver Corporation by W. F. Graver.*" (Italics ours.) [Tr. p. 71.]

C. There Was a Recital of the Contents of the Letter by Witnesses Who Recollected It.

(1) Objections to Evidence Because Questions Called for Conclusions of Witnesses Cannot Be Reviewed Where Not Made in the Trial Court.

In the case of *Knight v. Bentel,* 39 Cal. App. 502 (179 Pac. 406), at page 508, the court says:

> "The point that rulings of the court, to which exceptions 2, 3 and 4 were reserved, were error, because the questions *called for mere conclusions of the witness,* and not for a statement of fact, is not well taken, because *this objection was not advanced in the trial court and appears in this court for the first time. (Watrous v. Cunningham,* 71 Cal. 30, (11 Pac. 811); *People v. McCauley,* 45 Cal. 146; *People v. Bishop,* 134 Cal. 682, (66 Pac. 976).)" (Italics ours.)

(2) Testimony Consisting of Mere Conclusions of the Witnesses Must Be Given Effect Where It Is Admitted Without Objection.

Diaz v. United States, 223 U. S. 442;
Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 Southwestern, 1114;
McDonald v. Humphries, 146 Southwestern, 712;
1 Wigmore on Evidence, 173;
9 Encyclopedia of Evidence, 116;
38 Cyclopedia of Law and Procedure, 1395.

In the *Texas* case of *Wichita Falls & W. Ry. Co. of Texas v. Asher,* 171 Southwestern, 1114 at 1117, it is said:

> "We presume, if this testimony had been objected to as a *conclusion of the witness,* such objection would have been sustained, and as the Supreme Court of the United States said in the Albert Commission Co. case, *supra,* in passing upon a similar question:
>
> 'This testimony was not the best evidence, but, being offered and admitted without objection, *it was evidence which could not be disregarded.*'" (Italics ours.)

In the Texas case of *MacDonald v. Humphries,* 146 Southwestern, 712 at 713, the court says:

> "The evidence tending to show that appellee had parted with the title consists only of Brown's testimony, *which is, in effect, a legal conclusion;* but, as it seems to have been admitted without objection on that ground, it is sufficient to raise the issue." (Italics ours.)

In *9 Encyclopedia of Evidence,* 116, it is said:

> "Inadmissible conclusions or opinions of witnesses, if not properly and seasonably objected to, become evidence in the case and should be given the weight to which they are entitled."

In *38 Cyclopedia of Law and Procedure,* 1395, it is said:

> "* * * So, a failure to object waives objections that the witness was not sworn; *that the answer states a legal conclusion;* * * *" (Italics ours.)

In the case of *Diaz v. United States,* 223 U. S. 442, at 450, the court says:

"True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. *So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible.*" (Italics ours.)

The evidence in the case at bar shows that there were at least three witnesses who testified to the contents of the lost letter. C. R. Bird testified in regard to the contents of the letter as follows:

"The gist of the part that I saw was that *Holland had full authority to transact any business in Los Angeles on behalf of Graver Corporation,* particularly the settlement of the tank deal with Getty." (Italics ours.) [Tr. p. 61.]

H. P. Grimm testified as follows:

"Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery signed by one of the Gravers, *tending to show Holland had authority to act for Graver Corporation.*

* * *

I remember the letter distinctly because Holland said, 'Here is a letter from Graver Corporation with their heading on,' tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with the signature on. I saw the whole letter; it was signed by one of the Gravers

whose initials begin with a 'W'." (Italics ours.) [Tr. pp. 69-70.]

Andrew Mattei, Jr., testified as follows:

"The contents of that portion was *that Holland had full authority to act for Graver* in and around Los Angeles; it was signed Graver Corporation by W. F. Graver." (Italics ours.) [Tr. p. 71.]

This testimony even though it be conceded for the purpose of argument to be conclusions of the witnesses, was admissible and evidence in the case, and not being objected to on the ground that it was a conclusion of the witness, defendant will not be heard to raise this objection for the first time on appeal.

It, therefore, clearly appears that there was abundant evidence of the contents of the letter, and that since defendant's objection was merely a general one, being in the following words:

"This was objected to on the ground it is incompetent. irrelevant and immaterial." [Tr. p. 61.]

it has waived any right to urge in the Appellate Court that the statements were purely conclusions of the witnesses.

(3) Preliminary Proof as to the Loss of a Document Lies Solely Within the Sound Discretion of the Trial Judge, Exercise of Which Discretion Will Not Be Disturbed Unless the Preliminary Showing Is Manifestly Insufficient.

Choctaw Lumber Co. v. Waldock, 190 Pac. 866;
Morison v. Weik, 19 Cal. App. 139, 124 Pac. 869;
California National Bank v. Weldon, 14 Cal. App. 765, 113 Pac. 334;
22C. J., 1052.

In the case of *Morison v. Weik,* 19 Cal App. 139 (124 Pac. 869), at page 141, the court says:

> "Without entering upon a full discussion of the evidence, suffice it to say that it was sufficient to satisfy the mind of the court that the instrument was unintentionally mislaid or lost, and that after a diligent search made therefor it could not be found. *Such preliminary proof is left to the discretion of the trial judge,* and unless manifestly insufficient to warrant the introduction of secondary evidence, his ruling will not be disturbed on appeal. (Kenniff v. Caulfield, 140 Cal. 35 (73 Pac. 803).)" (Italics ours.)

In the case of *Choctaw Lumber Co. v. Waldock,* 190 Pac. 866, at page 868, the court says:

> "(5) The determination of the trial court, based upon supporting evidence, that a written agreement is lost, and that secondary proof of the terms of the lost writing is admissible, will not be disturbed on appeal. Marker v. Gillam, 54 Okl. 766, 154 Pac. 351; 17 Cyc. 542, and cases cited therein; Wigmore on Evidence, Vol. 2, p. 1405."

In the case of *California National Bank v. Weldon,* 14 Cal. App. 765 (113 Pac. 334), at page 773, the court says:

> "1. Where secondary evidence of the contents or nature of a lost instrument is sought to be introduced, the rule is as stated in Kenniff v. Caulfield, 140 Cal. 34 (73 Pac. 803), and as claimed by defendant. In the case cited the question was whether the conveyance was a grant, bargain and sale deed or a deed of gift. The proof of loss consisted of a search being made in a bureau drawer

where the deed had been for seven months before it was missed, and nowhere else, and it was held sufficient to raise a presumption of its loss. The court, in discussing the rule said: 'The rigor of the common law * * * has been relaxed in this respect, and non-production of instruments is now excused for reasons more general and less specific, and upon grounds more broad and liberal than were formerly admitted. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original—in fact, courts in such cases are extremely liberal. And the rule in questions of this character is, that the trial judge is to determine the sufficiency of the proof. *Under the facts and circumstances developed in the case, if they are sufficient to reasonably satisfy the mind of the court that the original is lost, and that it cannot be found after search made at the proper place, that is all that is necessary, and the sufficiency of the proof of the search being in general left to the discretion of the trial judge, this court will not review its rulings in that respect,* unless the proof is manifestly insufficient to have warranted secondary evidence." (Italics ours.)

In *22 C. J.*, page 1052, the rule is stated to be as follows:

"Preliminary proof of the loss or destruction of primary evidence does not involve the question in issue and is not regarded as evidence in the cause; it is addressed solely to the trial court and its sufficiency is a question for that court and not for the jury. *Moreover, the sufficiency of the evidence on*

> *the preliminary proof rests in the sound discretion of the trial court, whose determination will generally not be disturbed by an appellate court,* although it is reviewable and may be overruled where an abuse of discretion amounting to error of law appears." (Italics ours.)

Clearly in the case at bar there was evidence to support the District Court's finding and it cannot be truthfully said that the proof was manifestly insufficient to warrant secondary evidence.

4.

The Court Did Not Err in Permitting H. P. Grimm to Testify as to Statements Made by S. Reid Holland as to His Authority to Represent Defendant.

The case of *Hope Mining Company v. Burger,* cited above, where the court at page 244, says:

> "Where the agency is otherwise *prima facie* proved the declarations of the alleged agent are admissible in corroboration where they constitute a part of the *res gestae* and were made at the time of the transaction in question. They are admissible to show that the agent acted as such and not on his individual account, *and also to show the nature and extent of his authority.* (Robinson v. American Fish, etc. Co., 17 Cal. App. 212, (119 Pac. 388); 2 C. J., p. 930.)" (Italics ours.)

is in point as far as this objection is concerned. As heretofore pointed out the agency of S. Reid Holland for the defendant was *prima facie* proved by other evidence at the time the testimony here objected to was admitted.

Further, the objection is merely a general objection that the evidence was incompetent, irrelevant and immaterial and therefore the admission of the testimony may not be assigned as error on this appeal on the ground that an agent may not testify as to the scope of his authority.

5.

The Trial Court Did Not Err in Denying Defendant's Motion Made at the Close of Plaintiff's Case to Strike Out Testimony Which Had Been Received Conditionally on the Ground That No Testimony Had Been Offered Establishing a Connection or Laying a Proper Foundation for Its Admission.

(1) A Motion to Strike Out the Whole of Testimony Part of Which Is Admissible Is Properly Denied.

In the case of *Traynor v. McGilvray*, 54 Cal. App. 31 (200 Pac. 1056),at page 35, the court says:

> "A little later, and before ruling upon this motion, Mr. Hanlon renewed it as follows: 'Mr. Hanlon, I move to strike out the conversation between Mr. McGilvray, our opponent, and this witness in our absence.' The court denied both motions, and its action in so doing is assailed as error.
>
> We cannot give our assent to the appellants' contention in this regard. No ground of objection to this offered evidence was stated in either of said motions, except possibly that the conversation was objected to as in the absence of the plaintiff. This would not be a good objection to that portion of the witness' conversation with McGilvray wherein he asked her to be his intermediary in proffering his

aid to the plaintiff; (3) and as to what he said otherwise as to his own previous offer of aid to the plaintiff, the objection was not confined to this probably objectionable portion of the witness' testimony. but went to the whole statement of the witness, a portion of which was clearly admissible. *It was not, therefore, error of the trial court to deny the plaintiff's motion to strike out the whole of this testimony in the form in which such motions were made.* (*Hellman v. McWilliams*, 70 Cal. 449 (11 Pac. 659); *Lucy v. Davis*, 163 Cal. 611 (126 Pac. 490); *Estate of Huston*, 163 Cal. 166 (124 Pac. 852).)" (Italics ours.)

(2) A Motion to Strike Out Evidence Is Properly Denied Unless the Motion Specifies the Ground of Objection.

In the case of *Lippitt v. St. Louis Dressed Beef & Provision Co.*, 57 N. Y. Supp. 747, at page 748, the court says:

"2. The defendant's contention as to the erroneous admission of the conversation over the telephone is without merit. Its counsel moved to strike out Glover's testimony of a conversation had with De Casse or other employes of the defendant. *He assigned no grounds for the motion, and, as such conversations are not in their nature incompetent* (Murphy v. Jack, 142 N. Y. 215, 36 N. E. 882) *the failure to specify the objection, and thereby afford the plaintiff an opportunity to obviate it, renders the exception unavailable.* Bergmann v. Jones, 94 N. Y. 51. The judgment must therefore be affirmed." (Italics ours.)

(3) Testimony Consisting of Mere Conclusions of the Witness Must Be Given Effect Where It Is Admitted Without Objection on This Ground.

Diaz v. United States, 223 U. S. 442 (cited *supra);*
Tanner, et al., v. Harper, 75 Pac. 404 (cited *supra);*
Wichita Falls & W. Ry. Co. of Texas v. Asher, 171 S. W. 1114 (cited *supra);*
McDonald v. Humphries, 146 S. W. 712 (cited *supra);*
1 Wigmore on Evidence, 173 (cited *supra);*
9 Encyclopedia of Evidence, 116 (cited *supra).*

Applying the foregoing rules to the present objection to the ruling of the District Court it clearly appears that there was a *prima facie* showing by other evidence that S. Reid Holland was the agent of the defendant, and even though this were not true, defendant may not urge this point in the appellate court for two reasons:

First, the motion to strike was directed to *all* of the testimony and not merely confined to the objectionable part, the objection being in the following words:

"Whereupon defendant renewed its objections to *any* evidence regarding said letter, and moved to strike evidence concerning the same out." (Italics ours.) Tr. p. 67.]

Second, the ground which is urged on appeal that the testimony was a pure conclusion of the witness, as a basis for the motion to strike, was not presented to the District Court and therefore will not be considered by the Appellate Court.

FOURTH.

There Was Evidence to Support the Findings of the Court.

(1) Where the Record Does Not Purport to Contain All the Evidence It Will Be Presumed That There Was Sufficient Competent Evidence to Support the Findings of Fact and Judgment of the Court.

Hecht v. Alfaro, 10 Fed. (2d) 464;
Wilmon v. Aros, 191 Cal. 80; 214 Pac. 962;
Shuken v. Cohen, 179 Cal. 279; 176 Pac. 447;
Berri v. Rogero, 168 Cal. 736; 145 Pac. 95;
Western California L. Co. v. Welch, 41 Cal. App. 435; 183 Pac. 169;
Runyon v. City of Los Angeles. 40 Cal. App. 383; 180 Pac. 837;
Davies v. Stark, 25 Cal. App. 519; 144 Pac. 315;
Bagley v. Bloom, 19 Cal. App. 255; 125 Pac. 931.

In the case of *Western California L. Co. v. Welch,* 41 Cal. App. 435 (183 Pac. 169), at page 438, the court said:

> "(4) But we find, however, in the record of defendants' bill of exceptions that the defendants introduced in evidence a deed from the Los Angeles Title and Trust Company to plaintiff's grantor, the Title Guaranty and Trust Company, antedating the deed to plaintiff. *The contents of this instrument are not set out.* It does not even appear whether it was a deed to the land in question. Nothing, however, appears to the contrary. It may have contained recitals as to grantor's source of title that would estop defendants from claiming against it.

This deed was put in evidence by defendants, and they would be bound by its recitals. *The law will presume, where the extent and nature of the evidence is not sufficiently set forth in the bill of exceptions to show the contrary, that there was competent and sufficient evidence before the court to sustain its rulings and findings.* The burden is upon appellant to affirmatively show, by production of all the evidence on the point, that the ruling or finding was erroneous." (Italics ours.)

In the case of *Runyon v. City of Los Angeles,* 40 Cal. App. 383 (180 Pac. 837), at page 387, the court says:

"(2) *The record before us, as presented by the bill of exceptions, contains a part of the evidence, it appearing affirmatively therefrom that several witnesses, none of whose testimony is set forth, were sworn and testified. This being so, we very properly might affirm the judgment without any further discussion.* * * *

* * * *though the failure to include all the evidence in the bill of exceptions necessarily will compel us to resolve every material question of fact against appellants."* (Italics ours.)

In the case of *Davies v. Stark, et al.,* 25 Cal. App. 519 (144 Pac. 315), at page 520, the court says:

"No attack is made upon the findings, and *while the bill of exceptions discloses no evidence showing that plaintiff was damaged in any sum whatsoever,* or that defendants detained possession of the property, *we must, since the bill of exceptions does not purport to contain all of the evidence,* but only such parts of the record upon which defendants based their claim for a new trial, *indulge in the presump-*

tion that there was sufficient evidence adduced to justify the court in making the finding. Every presumption is in favor of the regularity of the judgment and proceedings upon which it is based, and to justify a reversal it devolves upon appellant to *affirmatively show error.*" (Italics ours.)

In the case of *Berri v. Rogero,* 168 Cal. 736 (145 Pac. 95), at page 741, the court says:

"But it appears from the order itself that, in addition to the affidavits of the defendant, oral evidence was heard upon the motions and that upon this evidence, as well as upon the affidavits, the order was made. That being so, this court must presume, even if it be conceded that the affidavits in themselves were insufficient to sustain the order, that the oral testimony introduced upon the hearing warranted the court in setting aside the default and judgment. *It is a well-settled rule of law that where evidence is omitted from the record this court must presume that the omitted evidence fully justified the order appealed from, although the evidence contained in the record itself is insufficient.*" (Italics ours.)

In the case of *Shuken v. Cohen,* 179 Cal. 279 (176 Pac. 447), at page 283, the court says:

"There is no force in the contention that the findings do not sustain the complaint or the amended complaint. *No part of the evidence except certain of the exhibits appears in the transcript, so we must assume that all of the findings are supported by ample proof.*" (Italics ours.)

In the case of *Wilmon v. Aros,* 191 Cal. 80 (214 Pac. 962), at page 82, the court says:

"The bill of exceptions does not set out all the evidence and we are uninformed upon what record the court acted. The judgment must, therefore, be affirmed upon the presumption that the court below decided correctly upon all the evidence before it. (*Gates v. Buckingham*, 4 Cal. 286; *Miller v. Dailey*, 136 Cal. 212, 220 (68 Pac. 1029).)"

In the case of *Bagley v. Bloom*, 19 Cal. App. 255 (125 Pac. 931), at page 266, the court says:

"Of course, 'all intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired unless the record itself shows to the contrary.' (*Morrissey v. Gray*, 162 Cal. 638 (124 Pac. 246).)"

In the case of *Hecht v. Alfaro*, 10 Fed. (2d) 464, at page 466, this court says:

"The plaintiff asserts that the sole issue upon the trial in the court below was as to whose duty it was to secure the transportation of the coffee. *He presents for the consideration in this court assignments of error directed to the verdict and the judgment, which he contends are erroneous, in that they are wholly unsupported by any evidence* of the defendant's performance of the contract, and he contends that under the evidence the obligation to furnish transportation and to furnish it during the month of May, 1920, rested upon the defendant. *Such assignments present nothing for the consideration of an appellate court. They bring up for review no ruling of the trial court. They do not show that at any point in the proceedings the court below committed error. Upon no question thus presented does*

it appear that the trial court was requested to make a ruling or give an instruction to the jury. This court has no authority to retry an action at law and render such judgment as we may think should have been rendered. We can review only rulings made by the trial court on questions brought to its attention and passed upon by it. Oregon R. & Nav. Co. v. Dumas, 181 F. 781, 104 C. C. A. 641; Bort v. E. H. McCutchen & Co., 187 F. 798, 109 C. C. A. 558; United States v. National City Bank (C. C. A.) 281 F. 754. These considerations are sufficient to dispose of the case upon the writ of error from this court." (Italics ours.)

(2) WHERE THE BILL OF EXCEPTIONS RECITES THAT CERTAIN EVIDENCE WAS INTRODUCED AT THE TRIAL AND THE EVIDENCE IS NOT SET FORTH IN FULL IN THE BILL OF EXCEPTIONS IT WILL BE PRESUMED ON APPEAL THAT THE SHOWING MADE THEREUNDER SUPPORTS THE FINDINGS OF THE TRIAL COURT.

In the case of *Fonner v. Martens*, 186 Cal. 623 (200 Pac. 405), at page 624, the court says:

"The bill of exceptions on this appeal does not include the judgment roll in the partition suit, but it recites that it was introduced in evidence on the trial, and we are, therefore, bound to assume that the showing made thereunder supports the findings of the trial court. (*Western California Land Co. v. Welch,* 41 Cal. App. 435 (183 Pac. 169).)"

Assuming for the purpose of argument that the evidence hereinafter referred to does not of itself support the findings of the trial court, nevertheless defendant may not in view of the foregoing rules and the record

in the instant case, attack the findings of the trial court on this writ of error. The record does not purport to contain all of the evidence received at the trial. For example in the transcript appear the following recitals as to the introduction of evidence, which evidence and exhibits are not set forth in the transcript.

"Plaintiff here offered Defendant's Exhibits 16, 37, 38, 39, 138, 139, 142 and 144, as to that portion of those exhibits which contained on the stationery of S. Reid Holland the following: 'Graver Corporation, inter office correspondence, Date, File No., To, Address, From.'" Tr. p. 58.]

"Defendant's Exhibit A-103 attached to the deposition was here introduced by the plaintiff.

'This telegram was sent by Mr. A. A. Butler, our sales manager. To a certain extent he had authority to send it, it was customary for him to send telegrams in the course of his duties.'" [Tr. pp. 46, 47.]

"Defendant's Exhibit 'B' was here introduced in evidence after the words 'as hereinafter shown there is a crease showing that at one time it had been folded at that place,' and after the crease is the sentence, 'Trusting you will get after Getty, etc.'" [Tr. p. 77.]

Again in plaintiff's opening brief appears this statement:

"We have shown that Holland testified that no such letter had existed, and it appears from the transcript that the testimony of the Gravers was taken in Chicago, and a great volume of correspondence attached to the depositions. If there is anything in that correspondence which supports plaintiff in error, we ask why such letters were freely given upon deposition, when one other letter has left no trace in anybody's files." (Opening Brief p. 12.)

(3) In an Action at Law Tried in a Federal Court Without a Jury Findings of Fact Made by the Trial Court on Conflicting Evidence Are Conclusive in the Appellate Court.

Behn v. Campbell, 205 U. S. 407;
Dooley v. Pease, 180 U. S. 126;
Felker v. First Nat. Bank, 196 Fed. 200;
Pacific S. Metal Works v. California Canneries Co., 164 Fed. 980;
Syracuse Tp. v. Rollins, 104 Fed. 958.

In the case of *Behn v. Campbell,* 205 U. S. 407, at page 407, it is said:

> "An appeal brings up questions of fact as well as of law, but *upon a writ of error only questions of law apparent on the record can be considered and there can be no inquiry whether there was error in dealing with questions of fact.*" (Italics ours.)

In the case of *Dooley v. Pease,* 180 U. S. 126, at page 131, it is said:

> "Where a case is tried by the court, a jury having been waived, *its findings upon questions of fact are conclusive in the courts of review.* It matters not however convincing the argument that upon the evidence the findings should have been different. Stanley v. Supervisors, 121 U. S. 547." (Italics ours.)

In the case of *Syracuse Tp. v. Rollins,* 104 Fed. 958, at page 961, the court says:

> "Six of the assignments of error are to the effect that the *facts found by the trial court are not supported by the evidence. But it is well settled that*

when the trial court to which a cause has been submitted makes a special finding of facts this court has not authority to inquire whether the evidence supports the findings, but only whether the facts found support the judgment." (Italics ours.)

In the case of *Felker v. First Nat. Bank*, 196 Fed. 200, at page 202, the court says:

"(3) The next error assigned is that 'the court erred in finding that the plaintiff had purchased said drafts and was the owner thereof,' and we are asked to review the evidence taken before the court on that issue and reverse its finding. This we cannot do. *When a jury is waived and a special finding of facts made by the trial court, an appellate court cannot review the evidence to ascertain its preponderance on one side or the other.* The findings as made must stand if there was any substantial evidence to sustain them. (4) Whether that was the case may be made a question of law for review in an appellate court, by requesting the trial judge to make some declaration that there was no such evidence or to render a judgment for the appropriate party because there was no such evidence, and, upon his refusal to do so, taking proper exception and assigning error thereon. Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; York v. Washburn, 64 C. C. A. 132, 129 Fed. 564, 566; United States Fidelity & Guaranty Co. v. Board of Com'rs, 76 C. C. A. 114, 145 Fed. 144, 151, cases cited. No such question of law was raised or decided below and for that reason cannot now be considered by us. Section 700 of the Revised Statutes 1878 (U. S. Comp. St. 1901, p. 570) provides as follows:

'When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.'

No rulings in the progress of the trial which were excepted to at the time are presented by the bill of exceptions for our consideration." (Italics ours.)

In the case of *Pacific S. Metal Works v. California Canneries Co.*, 164 Fed. 980, at page 982, this court says:

"1. The plaintiff in error insists that the Circuit Court erred in finding that there was a failure on its part to deliver 143,000 or any number of cans, required or needed by the defendant in error at its cannery. *Whether there was such failure or not is a pure question of fact, and this being an action at law, and before us on writ of error, the finding of the Circuit Court as to the fact, if there was any evidence upon which to base the finding, is conclusive here.*"

(4) Matters Not Assigned as Error Will Not Be Considered by the Appellate Court.

Wood v. Wilbert, 226 U. S. 384;
Childs, et al., v. United States, 5 Fed. (2d) 816;
Russell v. Huntington Nat. Bank, 162 Fed. 868;
Louie Share Gan v. White, 258 Fed. 798;
Wight v. Washoe County Bank, 251 Fed. 819.

Rule 11 of the United States Circuit Courts of Appeals (150 Fed. XXVII) reads in part as follows:

> "The plaintiff in error or appellant shall file with the clerk of the court below, * * * an assignment of errors * * *. * * * When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded * * *."

In the case of *Wood v. Wilbert,* 226 U. S. 384, at page 386, the court says:

> "It is urged further that neither the exception nor the demurrer complied with the 31st equity rule in that the appellees did not make affidavit that they were not interposed for delay. *It is sufficient to answer that the objection was not made in the court* below *and is not assigned as error on this appeal."* (Italics ours.)

In the case of *Childs, et al., v. United States,* 5 Fed. (2d) 816, at page 817, the court says:

> "In the argument before this court appellants urged both the defense of innocent purchaser and the bar of laches. *Neither of these matters are assigned as error, and they cannot be considered here;* * * *." (Italics ours.)

In the case of *Wight v. Washoe County Bank,* 251 Fed. 819, at page 822, this court says:

> "No assignment of error presenting this point was made, and we therefore pass it, merely observing, however, that the principle seems inapplicable to the case."

In the case of *Louie Share Gan v. White,* 258 Fed. 798, at page 799, this court says:

> "The objection to the proceedings in that case was not raised in this case in the court below and was not assigned as error in the appeal to this court. It was not mentioned until after the case had been submitted in this court. In the absence of a record presenting such an objection, it cannot be considered on appeal."

In the case of *Russel v. Huntington Nat. Bank*, 162 Fed. 868, at page 871, the court says:

> "Errors not assigned according to the rule will be disregarded. Under rule No. 11 (150 Fed. XXVII, 79 C. C. A. XXVII), therefore, the sixth assignment is not considered."

A perusal of the assignment of errors in the case at bar discloses the fact that defendant has not assigned as error any of the findings of fact of the District Court, in accordance with the requirements of rule 11 of the United States Circuit Courts of Appeals. Defendant is not therefore entitled to have the Appellate Court review the District Court's findings of fact. [Tr. p. 87.]

A. Plaintiff and Defendant Entered Into an Agreement in Writing.

The agreement between plaintiff and defendant was introduced in evidence at the trial and is set forth in the transcript as Plaintiff's Exhibit 1 and is executed as follows:

"Yours truly,
Graver Corporation,
By S. Reid Holland

Accepted
Hercules Gasoline Co.,
By C. R. Bird." [Tr. p. 63.]

In this connection it is to be noted that the original contract did not bear the notation:

"Approved.

Graver Corporation

East Chicago, Ind.

By....."

[Tr. p. 63.]

A stipulation filed with the clerk of the United States Circuit Court for the Ninth Circuit on or about the 24th day of May, 1926, is to the effect that the inclusion in the transcript of these words on Exhibit No. 1 at page 63 of the transcript was through an error.

B. S. Reid Holland Was Authorized to Execute the Agreement on Behalf of Defendant.

The testimony shows that the defendant wired to Geo. F. Getty to make its settlement for Graver Tank No. 2 through Holland, Exhibit 103. [Tr. p. 41.]

In Exhibit 67 [Tr. p. 52] a letter from defendant to S. Reid Holland, the defendant recognized that its agent S. Reid Holland had obligated it to the Hercules Gasoline Company. The letter reads in part as follows:

"It looks as if you will have to play a fine Italian hand with the Hercules Company to keep from getting us in bad, and I want you to keep us posted regarding the situation.

Yours very truly,

Graver Corporation

Vice President."

[Tr. p. 53.]

Further, the direct testimony of three witnesses was to the effect that the defendant had written a letter to

S. Reid Holland authorizing him to act for the defendant on the Pacific Coast.

C. R. Bird's testimony was as follows:

"In the course of this conversation Mr. Mattei brought up the question as to whether Holland had authority to act for Graver, and he produced a letter written on a Graver letterhead signed Graver Corporation by W. F. Graver. This letter was a long one and I did not see all of it. The gist of the part that I saw was that *Holland had full authority to transact any business in Los Angeles on behalf of Graver Corporation*, particularly the settlement of the tank deal with Getty." [Tr. pp. 61, 62.]

H. P. Grimm testified as follows:

"Holland said several times that he did, and said he had a letter and he showed us a letter from Graver Corporation on their stationery signed by one of the Gravers, tending to show Holland had authority to act for Graver Corporation." [Tr. p. 69.]

"I remember the letter distinctly because Holland said, 'Here is a letter from Graver Corporation with their heading on,' tending to show that he represented the Graver Corporation, and he folded it back and just let us see a part of the letter with the signature on. I saw the whole letter; it was signed by one of the Gravers whose initials begin with a 'W'." [Tr. p. 70.]

Andrew Mattei, Jr., testified as follows:

Bird and Grimm were skeptical about Holland's authority; he produced a letter with Graver Corporation printed on it at the head and folded it over and showed the lower portion. *The contents of that portion was that Holland had full authority to act for Graver in and around Los Angeles;* it was signed Graver Corporation by W. F. Graver." [Tr. p. 71.]

C. It Is Not True That S. Reid Holland Was Not Authorized by Defendant to Execute the Agreement Sued Upon.

The portions of the record heretofore cited show conclusively that the trial court's finding upon this issue was supported by evidence.

D. Plaintiff Produced Due Evidence of Having Acquired Title to Graver Tank No. 2.

Exhibit 38, a letter from S. Reid Holland to defendant, received in evidence, read in part as follows:

"Hercules agreed and did purchase tank #2 and at this writing it is their property." [Tr. p. 56.]

C. R. Bird testified as follows:

"S. Reid Holland was in Getty's office when this deal was made and saw the initial payment made by us on the tank and he saw the bill of sale which was handed to us.

* * * * * * * * * *

This was about the first week in February, 1924. This bill of sale was delivered and acknowledged October 10th, but it was executed before that. The initial payment was $3,000, and we paid $3,000. a month thereafter until the total of nine payments were made." [Tr. pp. 67, 88.]

In short the defendant asks this court to review on a writ of error the findings of the District Court based upon conflicting evidence. For example, in defendant's Opening Brief it is said:

"We ask Your Honor to scrutinize the testimony of Bird and Grimm, who were 'skeptical about Holland's authority,' and who now talk about a letter which they saw at a distance, folded in such a way that only the

last paragraph could be seen, and signed by some one whose signature they could not recognize." (Opening Brief, p. 13.)

In other words, defendant asks the Appellate Court to weigh the evidence given by Holland as against the testimony given by Bird, Grimm and Mattei, and then say that the District Court erred in believing the testimony of the latter and disbelieving the testimony of Holland.

It is respectfully submitted that the judgment of the District Court in favor of plaintiff should be affirmed.

Los Angeles, California, September 23, 1926.

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John M. Hall,
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